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NO. 90-474

SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

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JOSEPH M. WARD

PETITIONER

V

THE DAILY REFLECTOR, INC.

ALVIN TAYLOR

RESPONDENTS

****

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

****

SUPPLEMENTAL BRIEF

JOSEPH M. WARD
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QUESTION PRESENTED FOR REVIEW

V. ARE SUFFICIENT SAFEGUARDS IN PLACE TO ENSURE THAT STATE APPELLATE COURTS ADEQUATELY FULFILL THEIR DUTIES RELATING TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

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INTERVENING MATTER NOT AVAILABLE AT THE TIME OF PETITIONER'S LAST FILING

On pages 26-32 of his Petition For Writ Of Certiorari submitted on September 12, 1990, the Petitioner contends that there is substantial evidence that he has been damaged by unacceptable bias in the trial court and in the North Carolina Appellate Courts. Since then, the Petitioner has been saddled with an almost unbelievable ruling in yet another action. In Pitt County (N.C.) 89CVS587 (one of the false defamation suits related to the nursing home controversy; see Petition For Writ Of Certiorari, p. 27), sanctions including $1,950.00 in attorney's fees were entered against the Petitioner in this action and in favor of a defendant televesion station. The Petitioner appealed. (N.C. Court of Appeals No. 903SC564.) The Record On Appeal was settled by agreement and filed in time on May 29, 1990.

On July 10, 1990, the Petitioner filed his brief in time. On July 31, 1990, the defendant-appellees filed their Motion To Dismiss. The Motion To Dismiss reads in part as follows:

> Defendants Capital Cities/ABC, Inc., and Ned Warwick respectfully move the Court, pursuant to Rule 25 (b) of the Rules of Appellate Procedure, to dismiss the interlocutory appeal of Plaintiff-Appellant from the Order of the Honorable William C. Griffin, Jr., Judge Presiding, entered on 14 December, 1989, striking parts of the Plaintiff's Complaint and imposing Rule 11 sanctions, on the grounds of his failure to comply with the Rules of Appellate Procedure and for lack of jurisdiction, the Record On Appeal containing no summons with return or other papers showing jurisdiction

of the trial court over person or property, or a statement showing same as required by Rule 9 (a) (1) (c) of the Rules of Appellate Procedure. In support of such Motion To Dismiss, Defendant-Appellees show the following matters.

The Motion contains no allegation that the Petitioner had violated the North Carolina Rules Of Appellate Procedure other than by failing to include a copy of the summons with return or other papers showing jurisdiction of the trial court over the defendant-appellees in his Record On Appeal. On August 14, 1990, the Petitioner (Plaintiff-Appellant in that action) timely filed his Response To Defendant-Appellees Motion To Dismiss Appeal. In his response, the Petitioner pointed out the fact that the Record On Appeal contained a copy of the Complaint that he had filed and submitted

that such a filing was sufficient to show jurisdiction over the person who signed the complaint, as to whether or not he violated any of the North Carolina Rules Of Civil Procedure by signing the complaint. Further, the Petitioner submitted that jurisdiction of the trial court and/or the Court of Appeals over the defendant-appellees or their property was not pertinent to that appeal. Even so, the Petitioner pointed out the fact (s) that the Record On Appeal contains a copy of the Defendants' Answer and Counterclaim and that the defendants did not assert a defense of lack of jurisdiction over the person in any of their pre-answer defense motions (filed with their Answer) or in the Answer itself. Further, the Petitioner submitted that failure to present a defense of lack of jurisdiction over the person along with other pre-answer defenses submitted by motion, if any, waives

that defense, citing N.C. General Statute 1A-1 (North Carolina Rules Of Civil Procedure), Rule 12 (h) (1) and Spartan v. Brown, 14 N.C. App. 383, 188 S.E. 2d 574 (1972). Further, the Petitioner submitted that, even if the defendant-appellees are determined to have filed no pre-answer motions, they waived their right to a defense of lack of jurisdiction over the person by failing to include that defense in their answer, citing the same authority cited above. N.C.G.S. 1A-1, Rule 12 (h) (1) states as follows:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or ii if it is neither made by motion under this rule nor included in a responsive pleading;

or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

In addition to Spartan Leasing, Inc. v Brown, supra, the following case rulings are consistent with the Petitioner's contention that the defendants waived the defense of lack of jurisdiction over the person when they failed to include that defense in either a pre-answer motion or their Answer: Harris v Denhaur, 84 N.C. App. 666, 353 S.E. 2d 673 (1987), Hall v Hall, 65 N.C. App. 797, 310 S.E. 2d 378 (1984), Jackson County ex rel. Child Support Enforcement Agency v. Swayney, 75 N.C. App. 629, 331 S.E. 2d 145 (1985), reversed in part on grounds other than lack of jurisdiction, 319 N.C. 52, 352 S.E. 2d 413, cert denied _____ U.S. _____, 108 S Ct 93, 98 L. Ed 2d 54 (1987) and Sims v Stores, Inc., 285 N.C. 145, 203 S.E. 2d 769 (1974). Harris, Supra

(1987), holds that a defendant submits to the jurisdiction of the court by formally entering a voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some manner inconsistent with the defense that the Court has no jurisdiction over her. Jackson County, Supra (1987) holds that the defendant waived his right to contest lack of personal jurisdcition when he filed his answer without raising the defense of lack of jurisdiction over the person. The Record On Appeal not only contains a copy of the Defendants' Answer (containing their defenses presented by motion), but also an affidavit of defendant's counsel supporting entry of attorney's fees as a sanction, verbatum transcript of hearing at which counsel for the defendants participated and Stipulations As To Appeal (including the contents of the Record On

Appeal) signed by counsel for the defendants. From the record it is very clear that the trial court obtained initial jurisdiction over the defendants when the defendants filed their Answer, if such jurisdiction, in fact, had not been obtained by a proper summons having been properly issued and properly served (it had been). The subsequent appearances of the defendants make it abunduntantly clear that the trial court had acquired jurisdiction over them. Further, nothing in the Record On Appeal shows that the defendants even contested jurisdiction in the trial court (and they did not).

On September 24, 1990, the North Carolina Court Of Appeals entered an Order allowing the defendants above referred to Motion To Dismiss Appeal. The Order reads as follows:

> The motion filed on the 31st day of July,1990 and designated "Motion To Dismiss" is allowed. Appeal is

dismissed. Appellant to pay costs. By order of the Court this 24th day of September, 1990.

And it is considered and adjuged further, that the plaintiff-appellant, do pay the costs of the appeal in this Court incurred, to wit, the sum of TWENTY-NINE AND NO/100 DOLLARS (29.00) and execution issued therefor.

How could the North Carolina Court Of Appeals have ignored its own relatively recent rulings in Harris, Supra, Hall, Supra, Jackson County, Supra,plus the North Carolina Supreme Court's ruling in Sims, Supra (1974) and its own ruling in Spartan Leasing, Supra (1972)? In view of past erroneous rulings and unjustified delays that the Petitioner has experienced in the North Carolina Court Of Appeals, he respectfully submits that unacceptable bias against him

on the part of one or more of that Court's judges is the most logical explanation. If present, how did such bias come to exist? The Petitioner respectfully submits that the North Carolina Court Of Appeals began to delay the resolution of his cases and enter odd rulings (suggestive of bias) against him several years ago. At first, the Petitioner remained silent. As time went on, the rulings appeared to get worse. In January, 1990 the Court Of Appeals sustained the Rule 12 (b) (6) dismissal of an action brought against a nursing home by the Petitioner. The Petitioner did not and does not believe a Rule 12 (b) (6) dismissal of the entire action was justified. (Three attorneys have agreed with him.) The Court Of Appeals' Opinion affirming the dismissal was written by Judge S. Gerald Arnold and was filed on January 16, 1990.

Judge Arnold, a Democrat, is Chairman

of the North Carolina Judicial Standards Commission. North Carolina elects its judges. Domination of our judiciary by Democrats is somewhat threatened this year. On February 17, 1990,an article appeared in the Raleigh N.C. News And Observer relating to new guidelines for judicial candidates. According to the newspaper, the guidelines urged judicial candidates to avoid "attacks of a personal nature as well as attacks on specific cases" _____. According to the article, Judge Arnold suggested that lawyers, the press and others should bring"shame and disrepute on those who don't follow them (the guidelines)." The Petitioner (a former Republican Congressional candidate), feeling that he had already been victimized by erroneous rulings in the trial court and the North Carolina Court of Appeals due to bias, was considerably irritated by the above comments attributed to Judge Arnold. On

February 23, 1990, the Petitioner mailed a letter to the editor (of the News And Observer) which states as follows:

To the Editor:

So judicial dignity must be maintained in the upcoming election at any price. There should be no criticism of rulings in specific cases. And if judicial candidates refuse to go along with the program, the press and others should bring "shame and disrepute" on those who fail to follow the guidelines of the Judicial Standards Commission, says the Commission Chairman, Court Of Appeals Judge S. Gerald Arnold.

Presently, the Court Of Appeals is entering some horribly bad decisions which are being hidden under a rock called Rule 30 (e) of the North

Carolina Rules Of Appellate Procedure. If an appeal is decided under that rule, the opinion is not published. It is already difficult to lift the rock and bring a case out into the sunlight. The Judicial Standards Commission appears to be trying to make it even harder and appears to be seeking media help in doing so.

If sitting judges are not to be judged by their acts and omissions in specific cases, why not others, including physicians? That would eliminate malpractice and disciplinary actions against good physicians (and bad ones too). But it would be wrong, just as trying to totally insulate good (and bad) judges from their erroneous decisions is wrong.

The News And Observer has refused to publish any information concerning oddities related

to the rulings in any cases in which the Petitioner is or has been involved. Also, at times the paper has refused to publish general comments of the Petitioner as to what he perceives as being the best way to improve the North Carolina Court System. On this occasion, the newspaper elected to publish the 1st and 3rd paragraphs of the above quoted letter to the editor, but completely deleted the 2nd paragraph, without indicating that the newspaper had changed the letter or informing the writer (the Petitioner).

At the time he prepared his Petition For Writ Of Certiorari addressed to this Court in this action, the Petitioner had forgotten that the above quoted letter to the editor had been published. The recent almost unbelievable dismissal of his appeal by the North Carolina Court Of Appeals in appeal number 903SC564, described on pages 1 - 9 hereinabove, caused the Petitioner

to review his files where he found a copy of the letter to the editor. He then decided to review the timing of rulings in the North Carolina Court Of Appeals and the North Carolina Supreme Court in relation to publication of the letter. The above quoted letter to the editor was published on March 3, 1990. On March 20, 1990, the North Carolina Court Of Appeals entered its ruling in this action affirming the trial court's ruling that the Plaintiff had filed three actions containing the same claim (when he had in fact filed two actions with entirely separate claims, dismissed both and later filed a third action containing claims from each of the earlier actions). On April 5, 1990, the North Carolina Supreme Court entered an Order dismissing the Petitioner's Appeal from the opinion written by Judge Arnold (in the nursing home case referred to on page 10 above) and denying his Petition

For Discretionary Review. (On July 6, 1990, the Petitioner petitioned this Court for a writ of certiorari in that action, Petition No. 90-87. On October 1, 1990, this Court denied the Petition.) On June 13, 1990, the North Carolin Supreme Court entered an Order in the instant case dismissing the Petitioner's Appeal, denying the Petitioner's Petition For Discretionary Review and denying the defendants' motion for entry of sanctions based on frivolous appeal.

The Petitioner respectfully submits that the above described series of events and rulings, plus the series of events and rulings described on pages 27 - 30 of his Petition filed in this action and on pages 49 - 57 of his Petition For Writ Of Certiorari (No. 90-87) filed with this Court in Ward v Hillhaven, constitute substantial (if not clear and convincing) evidence to support his contention that the North Carolina Court Of Appeals not only committed

error in affirming the trial court's dismissal of the instant case, but erred due to prejudice on the part of one or more judges of that Court. While the evidence is less clear as to the North Carolina Supreme Court, it is reasonable to believe that bias in the North Carolina Court Of Appeals may have spilled upward into the North Carolina Supreme Court.

The Petitioner has appealed the dismissal of his appeal by the North Carolina Court Of Appeals (referred to on pages 8-9 hereinabove) to the North Carolina Supreme Court. The defendants in that case have moved the North Carolina Supreme Court to dismiss the Petitioner's Appeal and to deny his Petition For Discretionary Review. Further, the defendants had the gall to seek sanctions against the Petitioner for having filed a frivolous appeal from the North Carolina Court Of Appeals' Order dismissing his appeal. The Petitioner will not be at

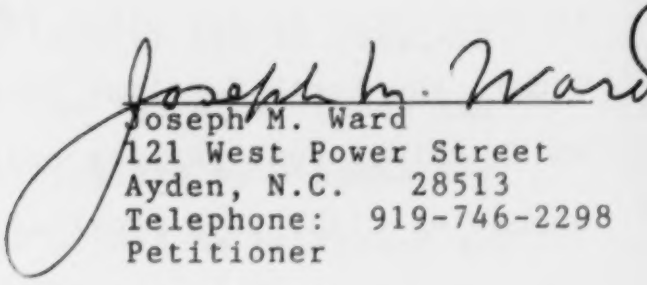
all suprised if the North Carolina Supreme Court refuses to hear that matter.

It is easy to say that the Petitioner might have fared better had he remained publicly silent. On the other hand, the Petitioner was victimized by a number of erroneous rulings before he expressed any public opinion as to our court system. And surely he has at least as much right to freedom of speech as do those who have falsely defamed him with impunity. And clearly, he has a right to participate actively in the political process, even when that process involves the dubious activity of selecting judges through partisan elections. The North Carolina Appellate Courts should have been careful not to enter any rulings even suggestive of bias on their part. The Petitioner respectfully submits that they fell far short as to that obligation.

CONCLUSION

The Petitioner respectfully submits that, in the absence of an appeal of right to this court or any other Federal Appellate Court, the North Carolina Court System, which allows some parties only one level of appeal of right to a panel of three judges who come to the bench by way of partisan elections while affording some parties a second appeal of right to the full North Carolina Supreme Court, falls short as to providing due process and equal protection pursuant to the 5th and 14th Amendments of the United States Constitution. Further, he respectfully submits that sufficient safeguards are not in place to ensure that the North Carolina Appellate Courts adequately fulfill their duties relating to due process and equal protection under the laws pursuant to the 5th and 14th Amendments of the United States Constitution.

Respectfully submitted this the 24th day of October, 1990.



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